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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 579.

UNITED STATES OF AMERICA,
Petitioner,

vs.

McCRORY HOLDING COMPANY ET AL.,
Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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SUMMARY OF ARGUMENT.

While counsel for the Government do not develop their argument under headings specifically tied to particular clauses of Rule 19(b), it is our understanding from the general course of their argument that they advance two grounds in support of their petition for certiorari:

first, that the Court of Appeals has decided a federal question in a way in conflict with an applicable decision of this Court; and, second, that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

In the first two sections of our argument we will make specific reply to these two claims of petitioner. (While our section headings do not make reference to these two claims of petitioner as such, the two sections are intended as replies to the two claims.) In the third section of our argument we will briefly outline our position that the Question Presented, as stated in the petition for certiorari (p. 2), while "an unsettled question," is not a substantial question in the light of *Danforth* v. *United States*, 308 U.S. 271, text 284, 84 L. Ed. 240, text 246. (We do not completely accept petitioner's "Question Presented," as we will later discuss.)

ARGUMENT.

I.

To Sustain Petitioner's Contention Would Not Call for a Mere Application of United States v. Dow; It Would Call for a Marked Extension of the Dow Case.

The claim of counsel for petitioner that the Court of Appeals has decided a federal question in a way in conflict with an applicable decision of this Court is based on counsel's claim that there has been here a misapplication of (or a failure properly to apply) the decision of this Court in *United States* v. *Dow*, 357 U.S. 17, 2 L. Ed. 2d 1109.

We realize that sometimes "the line between an unsettled question and possible misapplication of prior de-

cisions is shadowy" (p. 273 of 48 Harvard Law Review), but we respectfully submit that definitely here the contention counsel for the Government are making is with respect to the determination of an unsettled question or unsettled questions and not a "misapplication" of (or a failure properly to apply) the Dow decision. We accordingly submit that the question of whether this Court should review the decision of the Court of Appeals should be determined on the basis not alone of the validity or non-validity of the extension of the Dow case which the Government is here seeking but also on whether it is sufficiently important that the validity or non-validity of the extension of the Dow case so sought be authoritatively determined by this Court.[1]

It is the Government's position that under the Dow case the date of valuation for the taking, or proposed taking, of the fee to Tract 414-1 (and the other takings or proposed takings) should be July 2, 1957, the date of the filing of the complaint. Basing its argument on the Dow case, the Government contends that in the present case the date of the filing of the declaration of taking (November 20, 1959) is without significance and that the significant date is the date of the filing of the original complaint.

It is not our purpose in this Brief to discuss the Dow case in detail but we do wish to point out the factual situation in that case (which factual situation in connection with the factual situation here will, we feel, speak for itself in demonstrating that here we are not dealing at all with any question of a mere application of the Dow case):

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1. Compare: "It is of course impossible for the Court to interfere in every instance of analogical extension of old precedents to fit new problems." (p. 273 of 48 Harvard Law Review).

In the Dow case condemnation proceedings were filed in March, 1943. As requested in the petition, the District Court ordered the United States into the "immediate possession" of the strip of land involved. Within the next ten days the United States entered into physical possession and began laying a pipe line through the tract. In May, 1946, the Government filed a declaration of taking, under the Declaration of Taking Act. In this Court's opinion (p. 27 of 357 U.S.) the Court stated:

> "In the present case there is no dispute over the fact that the United States appropriated Parcel 1 on the date that it entered into physical possession *under order of the District Court.*" (Emphasis ours).

The question that this Court answered was stated as follows by the Court (p. 18 of 357 U.S.):

> "The principal question presented is whether the claim to 'just compensation' vested in the owners of the land at the time the United States entered into possession of the easement *pursuant to court order* in 1943, or whether such claim vested in the respondent, Dow, who acquired the land in 1945, at the time the United States filed a declaration of taking in 1946, under the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C., Secs. 258a-258e." (Emphasis ours).

This factual statement shows the total dissimilarity of the Dow case to the instant case. In the Dow case the Government was not in possession prior to the date upon which it filed its petition to condemn. In the instant case, the Government, when it filed its petition or complaint, was in possession of the land sought to be acquired and other land amounting in all to 255.07 acres (R. 84, 80) and had been in possession of such land for over 15 years (R. 78, 1) prior to the date it filed its petition to condemn the fee title to

Tract 414-1 and the interests sought in the other tracts. In the Dow case the Government obtained an order of possession and *went into possession pursuant to that order*, and the declaration of taking was not filed until long after there had been a definite overt act of taking, that is, the Government going into possession pursuant to order of Court. In the instant case, there was not at any time prior to the filing of the declaration of taking any overt act of taking, and the Government had not prior to November 20, 1959, either obtained an order of possession or filed a declaration of taking. In the instant case the only thing that can in all reason be claimed to be an overt act of "taking" is the filing of the petition to condemn.[2] The only thing which the Government did in this case which it did in the Dow case (and the only similarity of the two cases) is that in both cases the Government filed a petition to condemn but it was not the filing of the petition to condemn which was held to be the act of taking in the Dow case.

The Government's basic position in the instant case is that the filing of a petition to condemn can be, and under the circumstances here was, an act of taking. Whether such position is sound or unsound, it is clear that the Dow case did not hold the position to be sound. If the Government's contention is sustained, it will be by an extension of the Dow case—not by an application of that case.

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2. At page 10 of the petition counsel for the Government assert that "the keeping of possession plus the filing of a complaint to condemn the fee were the acts by which the government appropriated the property (the fee) to public use." We submit that the continuation of possession can scarcely be deemed an act of appropriation of the fee at all, and that what counsel for the Government are in effect claiming is that while the filing of a petition to condemn does not ordinarily constitute an overt act of taking, it does constitute an overt act of taking when the Government is already in possession of the property.

II.

There Is No Sufficient Public Importance for This Court to Be Called upon to Settle the "Unsettled Question" or "Unsettled Questions" Which the Court of Appeals Determined in the Present Case.

A. The Fact That the Decision of the Court Below Will Substantially Increase the Cost of the Condemnation Here Involved Manifestly Affords No Predicate for the Granting of Certiorari.

Apparently as an argument in support of the granting of certiorari, counsel for the Government in their petition (p. 14) make the following statement:

> "In the present case, there apparently has been a substantial increase in the value of the land during the 28-month interval between expiration of the temporary taking and filing of the declaration of taking. During the current period of rising real estate values, the rule promulgated by the court below will substantially increase the cost of federal condemnation."

It is not entirely clear to us as to exactly what counsel for the Government are contending in this connection.

On the one hand, they may be contending that this Court should grant certiorari because in the case of condemnations after temporary takings, a court holding that the mere filing of a petition to condemn the fee title does not itself constitute a "taking" will increase the cost of federal condemnation generally in the current period of rising real estate values. If this is what counsel are contending, such might be a relevant consideration in determining public importance if the occasions are in fact sufficiently numerous when condemnations to acquire fee titles do follow temporary takings and if it is a fact that, under the holding of the Court of Appeals here, there is in such condemnation suits no practical way for the Govern-

ment to protect itself against rising real estate values. The actual extent, however, of the recurrence of the problem has not been adequately shown nor is there any indication at all that the Government does not have practical means already at hand for protecting itself against rising real estate values.

If counsel for the Government, by the quoted statement, are contending that this Court should review the decision of the Court of Appeals in this case because such decision will increase the cost of our particular condemnation over and beyond what such cost would be if the decision had been different, we submit that such contention is not relevant at all. This Court does not grant certiorari because a case is important to a party as such or to give a party defeated in a court of appeals another hearing. We respectfully submit that certiorari should not be granted unless review by this Court would be the providing of some guidance that is really needed and that is important to be had in future cases. In condemnation litigation the Government is, of course, to be treated as any other party and the nature of the question to be reviewed rather than the question of which party lost in the court of appeals and is seeking certiorari in this Court should be the important factor. In condemnation litigation the United States Government is

> "but a party in interest having no greater standing or rights than those possessed by the former landowners. United States v. Dunnington, 146 U.S. 338, 351, 13 S. Ct. 79, 36 L. Ed. 996; United States v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336, 147 A.L.R. 55; United States v. Certain Lands in St. Louis, Mo., D.C. E.D. Mo., 41 F. Supp. 809."
>
> *United States* v. *Certain Parcels of Land*, 151 F.2d 116, text 117 (C.A. 2d).

B. This Case if Reviewed by This Court Would Not Necessarily Turn on One Legal Proposition Only But, Depending on This Court's Ultimate Views, Might Involve a Number of Legal Questions.

We do not understand counsel for the Government to contend that the filing of a petition to condemn is in all instances a "taking" of property. It is our understanding that counsel are contending that the filing of a petition can, under certain circumstances, be a "taking" of property. We ourselves contend that the filing of a petition is not itself a "taking" of anything. If the decision of the Court of Appeals here should be reviewed by this Court, and if on such review this Court should sustain our position that the filing of a petition to condemn is not itself a "taking" of anything, that would, of course, be an end to the matter.

If, however, this Court on a review by it of the decision of the Court of Appeals should determine that the filing of a petition to condemn can, under certain circumstances, be a "taking" of property, that would be merely the beginning of what would be necessary to determine this case because it would then be necessary to determine whether the circumstances exist here under which the filing of a petition to condemn does amount to a "taking". And it happens that the circumstances are not the same on all the tracts but vary greatly as between the different tracts. In particular, the situation with regard to Tract 414-1 is entirely different from the situation with regard to the other tracts. In discussing whether there would be any public importance involved in having the decision of the Court of Appeals reviewed, we feel that it will be desirable to discuss the situation with regard to Tract 414-1 separately from the situation with regard to the other tracts. It is respectfully submitted that our further discussion will make it clear:

1. That while on certiorari granted a decision of this case by this Court could rest on the decision of a single legal proposition, viz., that a petition to condemn cannot itself be a "taking" of anything, there is no certainty that such would be the conclusion reached as the whole purpose of the Government on this case is to obtain a holding directly to the contrary of this proposition; and

2. If the decision by this Court should be that a petition to condemn can under certain circumstances be a "taking", it would then be necessary for this Court to determine a number of propositions, that is, not only whether the filing of the original complaint was a "taking" but also whether each of the amended complaints was a "taking" and, if so, of what.

C. There Has Been in the Petition for Certiorari No Sufficient Showing That the Public Interest Requires a Review by This Court of the Decision of the Court of Appeals As to Tract 414-1.

The "Question Presented" as stated by counsel for the Government at page 2 of the petition is more nearly applicable to Tract 414-1 than to any of the other tracts involved in the suit but even as to Tract 414-1 it is not a full or an entirely correct statement of the exact question presented for the following reasons:

1. No question of a valuation "as of the date of the trial" is in any way presented by this case at the present time. The first order of the District Court (R. 87-90) did provide that the date of valuation was to be the date of trial (R. 90) but that order was entered before any declaration of taking was filed and the amended order, the order appealed from and which was entered after the declaration of taking was filed, fixed the date of the filing of the declaration of taking as the date of valuation (R. 135).

2. The question stated omits reference to the fact that at the time of the filing of the condemnation suit referred to in the question the United States Government was in possession not only of the land of which the fee title was sought (and other land in which limited interests were sought) but also of a large further acreage not in any way involved in the condemnation suit filed (R. 83).

3. The question stated omits reference to the fact that in a previous condemnation suit (the suit in which there had been a temporary taking) the Court had entered an order contemplating that there might be a holding over by the Government for a period of time after the stated period of the temporary taking expired and further contemplating that the Court would assess just compensation for any period of time during which the Government might so be in possession (R. 81-84).

4. The question stated omits reference to the fact that there was an interval of time between the expiration of the stated period of the temporary taking and the filing of the condemnation suit to acquire the fee (R. 81, 1).

5. The question stated omits reference to the fact that the Government never in any way notified the landowners that it had discontinued possession of any part of the land involved in the previous condemnation suit and never advised the landowners that it was in possession of any land under the suit filed to condemn the fee (R. 85).

6. The question stated omits reference to the fact that in the condemnation suit to acquire the fee there was no order of possession entered by the Court (R. 85) and no overt act of any kind on the part of the United States indicating that it had in fact taken the fee title to the tract of land referred to.

The facts of our case so far as Tract 414-1 is concerned are so far peculiar to our case that there would be no assurance at all that any decision in our case on Tract 414-1 would actually afford valuable guidance on any specific case that might arise in the future in which the suit filed might seek to condemn a fee interest after the Government had been in temporary possession. If, however, we assume that a decision by this Court on Tract 414-1 would actually afford specific guidance on some cases in the future, it still has not been shown that there is any public importance calling for a review by this Court as to Tract 414-1 for two reasons:

1. Counsel for the Government content themselves with asserting that "the government frequently condemns the fee interest after it has entered into temporary possession" (p. 14) and this relative term "frequently" without some further indication of the exact extent that the situation does actually arise does not have any tendency to show any public importance in having the question decided.

2. It is obvious that the Government can very readily protect itself against rising real estate values by obtaining an order of possession and advising the landowner that it has gone into possession under such order of possession. Where the Government can so readily protect itself in so simple a manner, we respectfully submit that there is clearly no public necessity shown for a decision by this Court to provide guidance in situations which need never arise.

D. Passing at This Time the Status of Tract 414-1, It Is Clear That Each of the Tracts Other Than Tract 414-1 Is in a Situation Sui Generis and a Decision by This Court with Respect to Such Other Tracts Would Not Afford Guidance in Future Cases Likely to Arise. However, if the Decision of the Court of Appeals Were Reversed As to Tract 414-1, It Would Be Grossly Unfair to Likewise Reverse the Decision As to These Other Tracts Without Going Into Their Particular Situations and Giving Some Specific Directions to the Lower Courts Regarding These Other Tracts.

The basic position of counsel for the Government is that the filing of a petition to condemn can under certain circumstances be an act of "taking". We dispute this basic position. If, however, this Court on a review of the case should determine that the filing of a petition to condemn can under some circumstances be an act of "taking," the question would still remain whether those circumstances exist in the present case. And in determining that those circumstances do exist, it is clear that while the situation with regard to Tract 414-1 is comparatively simple, the situation with the regard to each of the other tracts is extremely complex. If a petition to condemn can be an act of "taking," there would in that view of the case, as we will later point out in more detail, be many, many legal problems involved in determining the date or dates of taking of the particular interests at various times sought by the complaint and the several amended complaints from time to time filed. In other words, if the filing of an original complaint is an act of "taking," is the filing of an amended complaint a separate and distinct act of "taking" or how do you fit amended complaints into the concept of petitions to condemn constituting acts of "taking"?

Before the Court of Appeals, counsel for the Government attempted to sidestep these complexities by contend-

ing that any consideration of the details of the various amendments to the original complaint would only lead to confusion and that it was only necessary for the Court of Appeals to determine the situation with regard to Tract 414-1 ("property possessed by the United States on July 1, 1957, and of which fee title was described in the original complaint, all amendments and the declaration of taking") and that the basic principle being thus established, the detailed applications (that is the applications to tracts other than Tract 414-1) were matters to be determined upon remand after the basic principle was established.

We respectfully submit that if the decision of the Court of Appeals should be reviewed by this Court, it would be grossly unfair (if the basic position of petitioner should be sustained) for the situation with regard to Tract 414-1 only to be specifically considered and for the matter to be left up in the air with regard to the other tracts. It is oftentimes said that justice delayed is justice denied. Case No. 857 was filed on July 2, 1957 (R. 1); the first order of valuation was entered by the District Court on April 9, 1959 (R. 87-90); a Motion to Amend Order of April 9, 1959, was filed by the United States Attorney on April 17, 1959 (R. 92-93) and in this he sought to have the order amended to include language which would permit him to apply for an interlocutory appeal; on the same date he also filed a petition for rehearing (R. 90-91); on May 16, 1950, the District Court ruled on both the Motion to Amend and the petition for rehearing (R. 131-136) and entered the order that was appealed to the Court of Appeals. This order contained the finding required by Section 1292(b), Title 28, United States Code (R. 135-136), which, among other things, was that an immediate appeal from the order "*may materially advance the ultimate termination of the litigation*" (Emphasis ours).

The two purposes of the adoption of Section 1292(b) were expedition of litigation and the saving of useless expenditure of court time on retrials after correction of basic error on appeal (Senate Report, 1958 U. S. Code Cong. and Adm. News, p. 5255). We respectfully submit that both of these purposes would be defeated if this case were reversed by this Court on a determination with respect to one tract only and with the status left up in the air as to the other tracts.

We realize, of course, that if the public interest imperatively required the setting to rest of a question which could be set at rest by reference to one tract alone and if any determination as to other tracts would require an inordinate amount of the time of this Court, it would be within the discretion of this Court to make a determination with regard to the one tract only that the public interest called for and then leave the application of the principles established in such determination to the Court of Appeals or to the District Court. However, in determining whether to exercise this Court's discretion in that regard it is respectfully submitted that a greater degree of public importance should be required where a part only of the case is to be determined than in a situation where the application to the whole case of the principles adjudicated can be determined by this Court without an undue expenditure of the time and effort of this Court, and that particularly should this be the case on an appeal under Section 1292(b). If a review by this Court may retard the ultimate termination of the litigation rather than advance it, such fact on a case appealed under Section 1292(b) ought to be a material factor in a determination of whether to review the case. If there is a public importance as to one tract but one tract only and if the public importance with regard to that one tract is purely marginal, that might well be

a decisive consideration in determining not to review the case at all.

It is submitted that in considering the question of the granting of certiorari, the determination should be made on the basis that, if granted, it will be necessary for the Court to go into a multitude of problems the solution of which will be of doubtful utility in the general mass of condemnation litigation likely to arise in the future.

What are some of these problems?

Consider first Tract 414-2:

The original complaint filed July 2, 1957, referred to a tract 414-2 (R. 9) but the tract referred to was a far different tract from the Tract 414-2 as actually taken by the declaration of taking (R. 100, 101). The original complaint sought to take 31.57 acres (R. 9). The declaration of taking actually took 39.72 acres (R. 101). To some extent the additional land was made up of some areas previously mentioned in other respects in the original complaint. These areas (small areas) were Tracts 414-E-3, 414-E-4, 414-E-5 and 414-E-6 in the original complaint (R. 13-16). While these small areas are now a part of Tract 414-2 in the declaration of taking, there were 7.47 acres of land taken by the declaration of taking in its description of Tract 414-2 that were not in any way described in the original complaint. There were changes made in the first amended complaint from the original complaint and changes in the second amended complaint from the first amended complaint; there were changes in the declaration of taking from all three previously filed complaints.

If it should be the holding that a petition to condemn can be a "taking" and that one or more of the petitions to condemn here did in fact constitute a "taking", the follow-

ing would be some of the questions to be answered as to the date or dates of the "taking" of what is set out as Tract 414-2 in the declaration of taking:

Was the fee title to all of the 39.72 acres described in the declaration of taking (R. 100-101) taken when the Government filed its original complaint seeking to condemn the fee title to 31.57 acres only (R. 9, 10)? (When the Government seeks to condemn the fee to a part only of a larger tract, does a purchaser of the rest of the larger tract run the hazard of having his purchase confiscated by a retroactive amendment of the complaint?)

If the fee to only 31.57 acres was taken when the original complaint was filed, was the fee to the remaining 8.15 acres taken only when the declaration of taking was filed or when was it taken?

Was anything taken so far as Tracts 414-E-3, 414-E-4, 414-E-5 and 414-E-6 are concerned, when the original complaint was filed, in which petitioner sought 15-year easements (R. 25) in those tracts (R. 13-16)?

What was the effect of the first amended complaint, in which petitioner dropped Tract 414-E-6 (R. 41-42), changed the descriptions of the other three tracts (R. 39-41, 13-15) and changed the nature of the estate sought to be taken in each tract (R. 50-51, 25)?

What was the effect of the second amended complaint in which further changes were made in the estates sought to be taken in these tracts (R. 75-76, 50-51)?

If there were "takings" of some character when the original complaint was filed on July 2, 1957, and there were severance damages resulting from such "takings," would the severance damages be disregarded in the assessment of compensation after the amended complaints and the

declaration of taking were filed or, if not, on what basis would the severance damages be assessed?

Problems as substantial and numerous arise with regard to Tracts 414-E-7, 414-E-9, 420-E and 422-E:

The land description of Tract 414-E-7 in the declaration of taking is materially different from its description in the complaint filed July 2, 1957 (R. 17). More important, the declaration of taking actually took a permanent easement in Tract 414-E-7 (R. 97) whereas the original complaint sought only a 15-year easement (R. 25, 26). Can it be that there was a "taking" of a permanent easement on July 2, 1957, when only a 15-year easement was sought at that time and the first time a permanent easement was injected into the case was the filing of the declaration of taking on November 20, 1959?[4] (While the Government at p. 13 of the petition concedes that the additional area not described in the original complaint at all, and apparently as well the areas described in the original complaint but there referred to as easement areas, cannot be valued as of the time of the original complaint; but the Government ap-

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3. While petitioner in the footnote on page 13 attempts to disparage any importance to be attached to the valuation of the easements inferring that the maxim *de minimis non curat lex* should apply, it is obvious from the location of Tract 414-E-7 that that tract is a valuable property and there is nothing in the record to indicate that all of the tracts are not in fact of very substantial value. The Government's estimate of a nominal value on Tracts 420-E and 422-E is, of course, not of any force whatever against the landowners, and on Tracts 414-E-7 and 414-E-9 the estimated compensation was not separately set out but these two tracts were included with Tracts 414-1 and 414-2 in a total estimated compensation of $291,930.00 (R. 97, 103).

4. Is it possible when the Government files a suit to condemn a temporary easement on a piece of land that no purchaser can buy the land without running the hazard of having his investment confiscated by an increase in the estate sought from a temporary easement to a permanent easement?

parently contends on the same page that there is a different rule when a temporary easement is increased to a permanent easement and that the permanent easement, although no one knew until the declaration of taking was filed that it was sought, should nevertheless be valued as of the date the original complaint was filed and sought a temporary easement.)

The first time Tract 414-E-9 was mentioned in this case was October 2, 1958 (R. 30, 44), when the first amended complaint was filed. At that time a 15-year easement was sought (R. 51). Not until the filing of the declaration of taking was the permanent easement sought (R. 96). Could there be a taking of a permanent easement at any time prior to the declaration of taking? Was anything at all taken when the original complaint was filed? Was a 15-year easement taken when the first amended complaint was filed?

The land referred to as Tract 420-E in the declaration of taking was not a part of the 255.07 acres which had been involved in Case No. 624 and the Stipulation of Counsel does not cover whether Tract 420-E was or was not in possession of the United States on July 2, 1957. With these exceptions and the further exception that Tract 420-E was not mentioned in the original complaint in Case 857 by that tract number or as belonging to respondents here, Tract 420-E is in the same situation as Tract 414-E-7 as above referred to.

What is designated Tract 422-E in the declaration of taking (R. 110) was a part of Tract 414-E-2 in the original complaint (R. 38). Tract 414-E-2 was not a part of the 255.07 acres which had been involved in Case No. 624 but the Government was in possession of it on July 2, 1957. The original complaint in Case 857 sought a 15-year easement

in Tract 414-E-2 for "sewage treatment facilities" (R. 25). The first amended complaint sought a 15-year "term of years" in Tract 414-E-2 (R. 50). The second amended complaint sought the "exclusive use for a period of 15 years" of Tract 414-E-2 (R. 75). The declaration of taking dropped all of Tract 414-E-2 except what it referred to as Tract 422-E and sought a permanent easement over Tract 422-E for "underground sewer and water lines" (R. 96). The following are among some of the questions which occur if a petition to condemn is to be considered a "taking": Was there a taking of a 15-year easement over and across Tract 414-E-2 for sewage treatment facilities on July 2, 1957? Was there a taking of a 15-year term of years over Tract 414-E-2 on October 2, 1958, when the first amended complaint was filed? Was there a taking of the "exclusive use" of Tract 414-E-2 for a period of 15 years when the second amended complaint was filed on December 8, 1958? Was there a taking of a permanent easement over Tract 422-E on November 20, 1959, when the declaration of taking was filed?

The above illustrate some of the many problems that are presented in this case if the Government's theory is accepted that the filing of a petition to condemn can be a "taking" of property. We respectfully submit that if certiorari should be granted and if on such certiorari the Government's basic theory that the filing of a petition to condemn can be a "taking" of property should be accepted, it would be only fair to the landowners that specific answers be given to the many intricate problems that acceptance of the Government's basic theory would involve in the present case.

It is submitted further that while there are "unsettled questions" here involved, there is no "unsettled question" in the present case of sufficient pressing and current im-

portance for the Court to take the time to devote to this case which the interests of justice would require be taken if the case is to be reviewed at all.

III.

Not Only Is the "Question Presented" As Stated by Petitioner Somewhat Incomplete, Not Entirely Accurate and So Far As Applicable at All Applicable to Only One Tract, but It Does Not Actually Present Any Substantial Question in View of Danforth v. United States, 308 U.S. 271, Text 284.

Under the *Dow* case (257 U.S. 17, 2 L. Ed. 2d 1109) there is no question that if the Government files a suit to condemn a piece of property and upon the filing of the suit procures an order of possession and enters into possession pursuant to such order, there has been a "taking" of the property.

Another proposition which, while not specifically covered by the Dow case, would seem not fairly open to question is that if the Government already in possession under a temporary taking files a suit to condemn the fee and then obtains an order of possession and notifies the owner that it has gone into possession under the order of possession, such notification after the obtaining of an order of possession is to be treated as equivalent to the "entry" into possession referred to in the Dow case.

What we are dealing with here is something else entirely. What counsel for the Government are here contending for is something far beyond what was held in the Dow case. What they are contending is that when the Government is already in possession of property and files a petition to condemn the fee title, the filing of the petition to condemn is itself a "taking" of the property without any order of possession being obtained and without any

notification to the owner that the Government is in possession under the suit to acquire the fee. This, we respectfully submit, is directly contrary to the rationale of *Danforth* v. *United States*, 308 U.S. 271, Text 284, 84 L. Ed. 240, Text 246, in which this Court made clear the limited effect and sole purpose of a mere petition to condemn, viz., that it is a means by which the sovereign may find out what any piece of property will cost:

> "The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. *Condemnation is a means by which the sovereign may find out what any piece of property will cost.*" (Emphasis ours)

Compare:

> *Kanakanui* v. *United States*, 244 Fed. 923 (C.A. 9);
> *United States* v. *Johns*, 146 F.2d 92 (C.A. 9);
> *Benedict* v. *City of New York*, 98 Fed. 789 (C.A. 2).

In view of the Danforth case, we respectfully submit that the question presented as tendered by the Government is not one of substance.

CONCLUSION.

Our first position in opposition to the granting of certiorari is that we are not here dealing with any decision of the Court of Appeals which could possibly be said to be in conflict with a decision of this Court (*United States* v. *Dow* in particular) but that what counsel for the Government are contending for is an extension of the Dow case rather than an application of that case.

Our further position is that in view of the Danforth case the question presented by the Government is not one of substance but that, if it were, the decision by this Court of the various detailed propositions involved in determining dates of taking in this case would take up time of this Court out of all proportion to any public importance there might be in making such determinations, that there has been no adequate showing of the frequency in which any of the problems presented are likely to recur and that the Government is already in position to adequately protect itself against rising real estate values by the simple expedient of obtaining an order of possession and notifying the landowner that it has entered possession under such order of possession. We respectfully submit that no adequate reason has been advanced for a review by this Court of the decision of the Court of Appeals and that the certiorari sought should be denied.

Respectfully submitted,

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